Reportable

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH

Case No: 2233/2014

In the matter between:

J. P. M. K. Applicant

and

R. P. Respondent

REASONS FOR JUDGMENT GIVEN ON 28 AUGUST 2014

REVELAS J

[1] The applicant brought an urgent application *ex parte,* for the return of certain movable items (television and furniture) and an engagement ring, which are currently in the possession the respondent.

[2] On 15 July 2014, the respondent was interdicted from removing or dealing with the possessions listed in a schedule listing the items referred to, pending the outcome of the application for final relief which was to be set down for argument within thirty days. The matter was subsequently set down by the applicant on the unopposed roll. It stood down to the

opposed roll on the Thursday for it ought not to have been enrolled on the unopposed roll. The applicant, quite properly, has tendered the wasted costs for Tuesday 26 August 2014.

[3] The facts which gave rise to the application are that the applicant and the respondent formed a romantic relationship towards the end of 2012 and became engaged to be married some time thereafter. It was a stormy relationship and ended shortly before the present application was brought. The respondent is still married to her current husband but is in the process of divorcing him.

[4] The applicant, during the cause of the relationship placed furniture and the other items listed in the schedule, in the applicants' home and gave her an engagement ring. At least on one occasion (the applicant alleges it was on three occasions), the applicant, after a quarrel had broken out between them, removed all the furniture items from the respondent's home by loading them onto a truck. When they made up again, he took the items back to her home. It is common cause that at least on one occasion the applicant removed the items at the behest of the respondent.

[5] The respondent admitted that she and the applicant broke up and made up twice, and that she, on one occasion, told the applicant to fetch the items in question from her home after one of their quarrels. She

explained that she resented the applicant having said that if it were not for him, she would not have had any of the said items. She denied that the applicant removed his possessions from her home every time they broke up.

[6] After their final break-up, the applicant wanted to fetch his furniture from the respondent's home and the respondent's response was an SMS in which she indicated that she would not return the applicants' "stuff" because she needed them to pay her rent. (She held the applicant responsible for losing her employment). She also indicated that she regarded the items as gifts.

[7] At issue between the parties is (a) whether the ownership of the movable items vests in the applicant, or whether they had become gifts to the respondent and (b) whether the applicant is entitled to return of the engagement ring.

[8] The applicant's case is that he never intended to transfer ownership of these items to the respondent, as the items were placed in the respondent's home for his own use and convenience whilst staying over in the respondent's home from time to time.

[9] The applicant feared that the respondent would start alienating his goods to pay off her debts. Hence he brought the application on an urgent and *ex parte* basis.

The Furniture and other Immovable Items

[10] A true donation is an agreement whereby the donor, motivated by pure liberality, undertakes to give to a donee a gift without receiving any advantage in return for it, in other words, unconditionally. The onus is on the party alleging a donation to prove that the motive of the donor to the agreement was one of "pure liberality".[1] The defendant maintains that the items in question were gifts donated to her by the applicant. She however does not specify how and in which circumstances they became gifts.

[11] A donation is never presumed but must be proved by the person alleging it. In *Barkhuizen v Forbes*[2] it was held that the person alleging ownership has an overall *onus* to establish his claim without the assistance of the party alleging that it was a donation being obliged to prove that it was a donation. The presumption of ownership is a rebuttable presumption of fact or an inference which may be drawn in the circumstances of the case.[3]

[12] The impression gained from those facts which are common cause in this matter, is that the furniture belonged to the applicant and was

[1] LTC Harms: Amler's Pleadings 7th ed 183.

[2] 1998 (1) SA 140 at 15 H-J

[3] 3 Hoffman and Zeffert the South African Law of Evidence 4th ed at 533 and 555.

brought onto the respondent's premises for the combined use of the applicant, the respondent and her children, for as long as the applicant visited them at the house and stayed over.

[13] The respondent does not deny that the applicant was at least initially the owner of the items. However she proffered no details as to how they later became donations to her. It is common cause that the applicant had taken back his items at least on one occasion. If the respondent was indeed the true owner of the items she would have insisted on keeping them on that occasion and she did not. The items in question were not even on the premises for two months after they were brought back after the last quarrel, when the present application was brought. The respondent was unable to discharge the *onus* of proving that they were gifts made to her

The Engagement Ring

[14] The respondent maintains that because she was still married to her current husband when they became engaged to each other, the applicant is not entitled to the return of the engagement ring. The respondent, relying on the rule '*in pari delicto potior est conditio defendentis',* submitted that both parties were at fault because their engagement was *contra bonis mores* and therefore unenforceable. Accordingly, the *par delictum rule* which is concerned with the moral guilt of the parties, entitled her to retain the ring. In this regard the respondent relied on the

decision in *Pietzch v Thompson*[4] where the plaintiff (*Pietzch)* alleged that the defendant had repudiated her promise to marry him, and sued for the return of a ring, a watch and sums of money. He alleged that the goods were given in contemplation of the marriage which was to take place after the defendant had obtained her divorce from her husband. Because of the defendant's marriage to someone else at the time of the engagement, the court held that the plaintiff was barred by the *par delictum* rule to claim the return of any donations made by him to the defendant.

[15] The general rule is that all gifts, other than small tokens of affection, must be returned if the engagement is terminated by mutual consent.[5] In the present matter, unlike in *Pietzch*, the engagement was broken off by mutual agreement. It is not in dispute that the applicant did not know that their engagement was void. It can be assumed therefore that his intention in giving the respondent the ring at the time they got engaged, was in contemplation of a future marriage.

[16] Counsel for the applicant referred me to a decision of the Court of Appeals of Michigan,[6] where it was held that an engagement ring is an "impliedly conditional gift" which is only a completed gift upon marriage and if the engagement is terminated for *whatever reason*, the gift is not

[4] 1972 (4) SA 122 (R).

[5] DSP Cronjé, J Heaton South African Family Law Butterworths (1999) 17.

[6] *Meyer v Mitnick,* Michigan Court of Appeals (USA) Docket No 213950, dated 20 February 2009.

capable of being a completed gift and must be returned to the donor. That is with respect, a sensible approach.

[17] The engagement ring was given to the respondent in this case in contemplation of a marriage and remained a conditional gift. Since the condition of marriage was not fulfilled, the ring ought to be returned to the donor, because it is no longer capable of becoming a completed gift. This principle, in my view, also applies if the engagement is void *ab initio* by virtue of it being *contra bonis mores.*

[18] It strikes me as rather unfair in these particular circumstances that the respondent (donee) should benefit from the *par delictum rule* at the expense of the applicant, if both parties were "at fault" and the engagement was terminated by mutual consent. Why should the applicant alone be penalized? It makes no sense. At least he is the one party to the engagement who was not married to someone else.

[19] Accordingly, the applicant should succeed in this application. However, as pointed out during argument, the magistrates' court also had jurisdiction to entertain this application because the combined value of the goods in question was just below R100 000.00. That aspect is dealt with in the costs order.

[20] In the result the following order is made:

1. The respondent is ordered to return to the applicant, the items listed in Schedule “A” of the applicant’s notice of motion.

2. The respondent is to pay the costs of the application, on the magistrates’ court scale.

3. The wasted costs occasioned on Tuesday 26 August 2014, shall be paid by the applicant.

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E REVELAS
Judge of the High Court

Counsel for the Applicant, Adv William, instructed by Leon Keyter Attorneys.

For the Respondent, Mr H Lerm, instructed by Legal Aid.

Date Heard: 28 August 2014

Order Delivered: 1 September 2014

Reasons Available: 8 October 2014